TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1939

No. 565

PHILIP HURN AND PERCY MORGAN, JR.,
PETITIONERS,

vs.

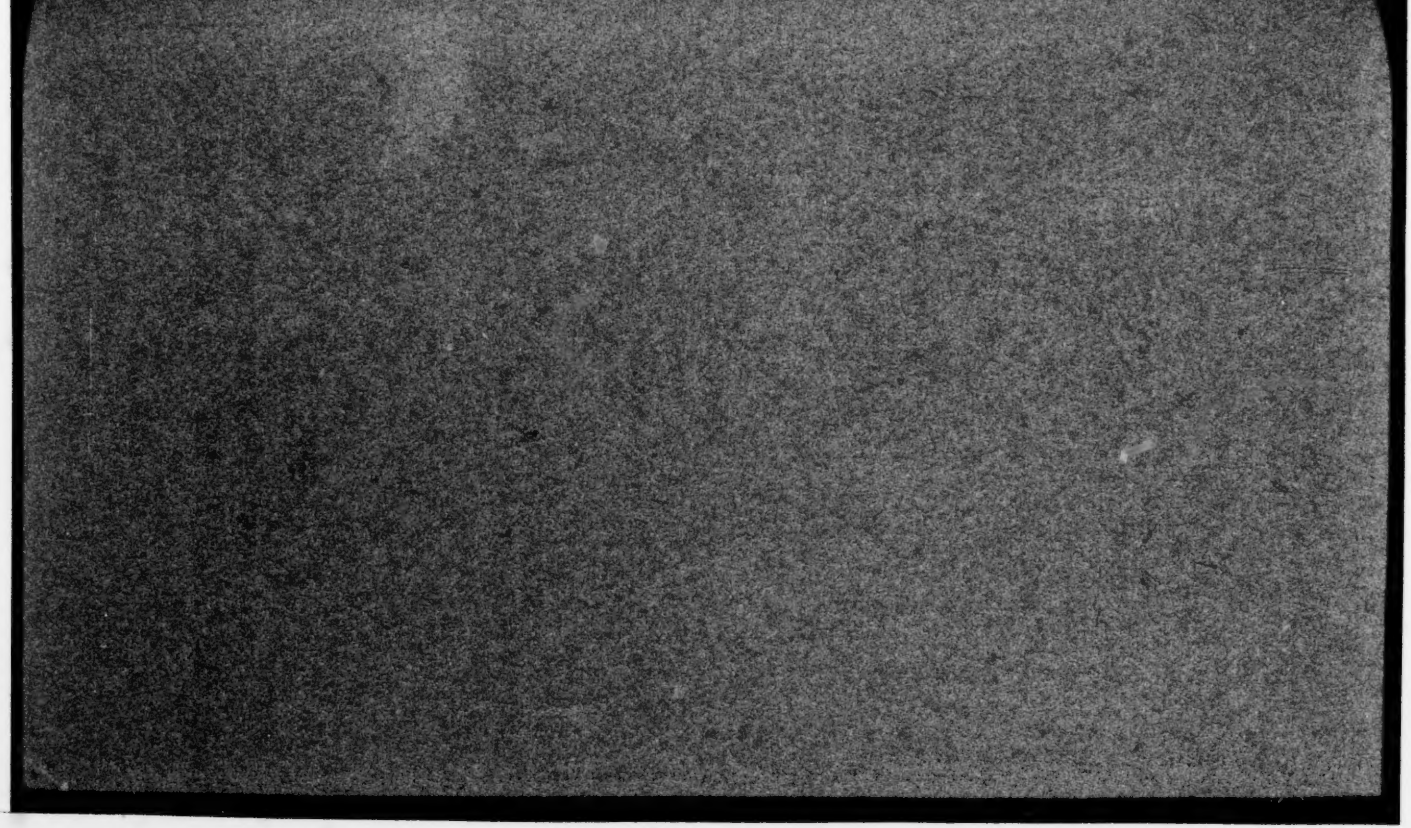
FULTON OURSLER, LOWELL BRENTANO, ALBERT LEWIS AND SAM H. HARRIS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 21, 1939.

CERTIORARI GRANTED JANUARY 22, 1940.

(37,262)



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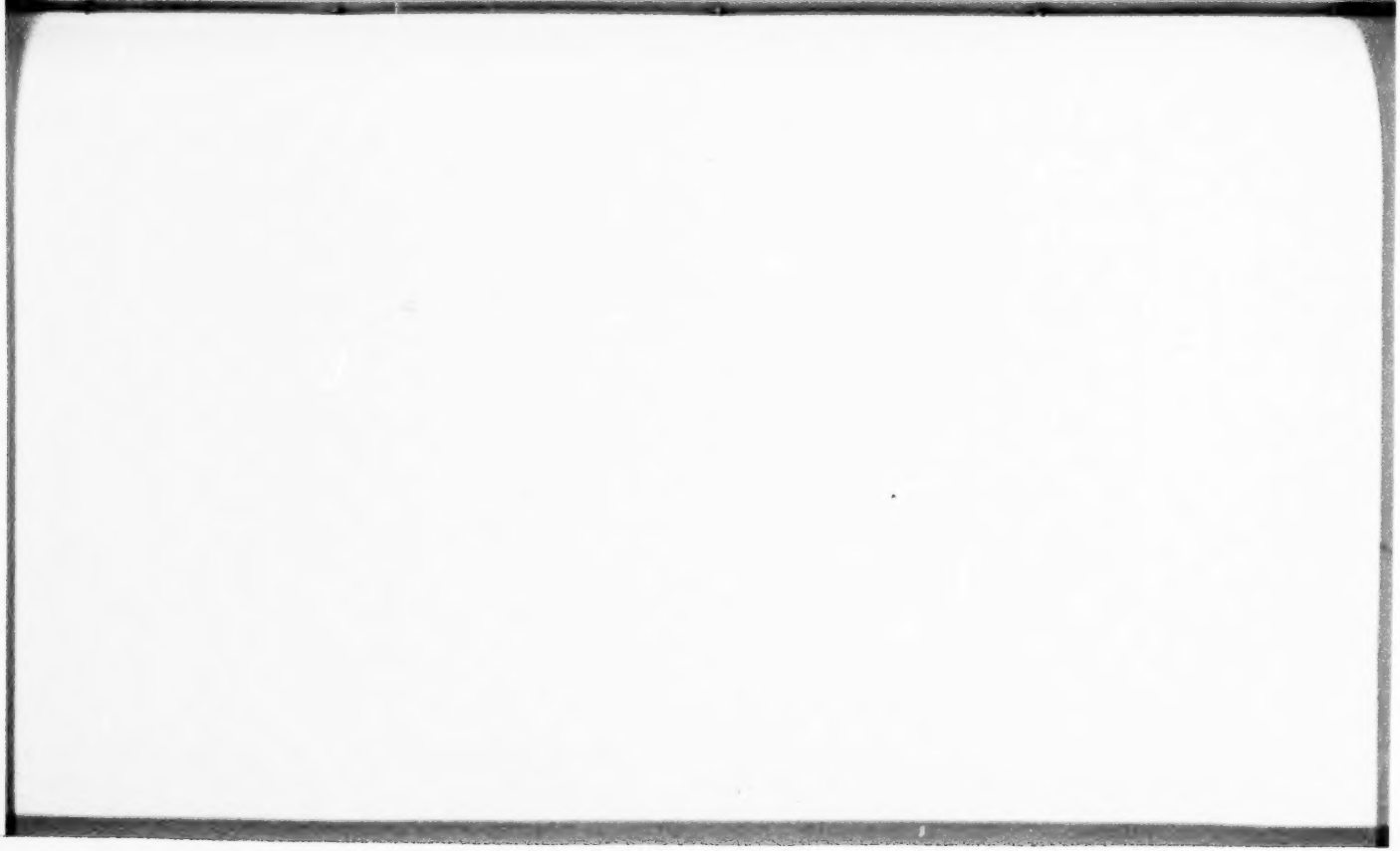

[fol. 1] STATEMENT PREFIXED TO RECORD

1. Caption:

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

PHILIP HURN and PERCY MORGAN, JR., Complainants,

against

FULTON OURSLER, LOWELL BRENTANO, ALBERT LEWIS, SAM H. HARRIS, Shubert Theatre Corporation, WILLIAM E. MORRIS, DONALD MACKENZIE, ELEANOR GRIFFITH, JOHN F. MORRISSEY, ARTHUR STEWART HULL, JOHN BURKELL, ANTON ASCHER, PRISCILLA KNOWLES, EDWARD MANN, MURRAY ALPER, WALTER TRAVERS, THOMAS FINDLAY, JOHN ROGERS, HENRY PHILLIPPI, JOHN KELLY, ALFRED GOLDIE, D. J. FLANAGAN, CHARLES HAMLIN, CLIFFORD STONE, JOHN O. HEWITT, ROY HARGRAVE, H. YANO, GERMAINE GIROUX, and JOHN HALLIDAY, Defendants

2. The suit was commenced by the filing of the bill of complaint and præcipe and the issuance of a subpoena, on January 23, 1928.

[fol. 2] 3. The names of the original plaintiffs are Philip Hurn and Percy Morgan, Jr. There has been no change as to the parties plaintiff.

The names of the original defendants are: Fulton Oursler Lowell Brentano, Albert Lewis, Sam H. Harris, Shubert Theatre Corporation, William E. Morris, Donald Mackenzie, Eleanor Griffith, John F. Morrissey, Arthur Stewart Hull, John Burkell, Anton Ascher, Priscilla Knowles, Edward Mann, Murray Alper, Walter Travers, Thomas Findlay, John Rogers, Henry Phillippi, John Kelly, Alfred Goldie, D. J. Flanagan, Charles Hamlin, Clifford Stone, John O. Hewitt, Roy Hargrave, H. Yano, Germaine Giroux and John Halliday.

The subpoena was served upon Fulton Oursler, Lowell Brentano, Albert Lewis and Sam H. Harris. The trial was had as to these defendants and there has been no change otherwise as to the parties defendant.

4. The dates of filing of the pleadings are as follows:
(a) The bill of complaint was filed on January 23, 1928.
(b) The answer of the defendant Fulton Oursler was filed on February 29, 1928.
(c) The answer of the defendant Lowell Brentano was served on March 5, 1928.
(d) The answer of the defendants Albert Lewis and Sam H. Harris was filed on February 6, 1928.
[fol. 3] (e) The amended answer of the defendant Fulton Oursler was served on or about March 27, 1928.

5. The amendments to the complaint were allowed in Court on November 5, 1931.

6. None of the defendants was arrested, or bail taken, or property attached, or arrested.

7. The trial was had on November 5, 6, 9, 10, and 28, 1931, respectively, and the name of the judge is the Hon. Julian W. Mack, United States Circuit Judge.

8. No question was referred to a commissioner or commissioners, master or referee.

9. There was no interlocutory decree and the date of the entry of the final decree was December 22nd, 1931.

10. The Allowance of Appeal and Citation on Appeal as signed were filed by Judge Mack with the Clerk of the District Court on February 4, 1932.

[fol. 4] IN UNITED STATES DISTRICT COURT

[Title omitted]

COMPLAINT

The complainants above named by Lorenz & Lorenz, their solicitors, complaining of the defendants, allege:

First. That the complainants invoke the jurisdiction of this Court upon the ground that the Copyright Law of the United States is directly involved in this action.

[fol. 5] Second. That complainants are citizens of the United States, residing in the City, County and State of

New York; and upon information and belief, that all the defendants reside in the City, County and State of New York.

Third. That prior to the 25th day of August, 1924, the complainants composed and were the authors, inventors and proprietors of a certain new and original dramatic work or play of great novel and artistic value, which had never been published, entitled "The Evil Hour."

Fourth. That on or about the 26th day of August, 1924, the complainants deposited one complete copy of said dramatic composition, with the claim of copyright thereof, in the Copyright Office of the United States of America, situate in the Library of Congress, Washington, D. C., in accordance with the statute of the United States in such case made and provided and did secure copyright upon the aforesaid dramatic composition in conformity with Sec. 55 of the Act to Amend and Consolidate the Acts respecting Copyright, approved March 4, 1909, as amended by the Act approved March 2, 1913; that entry of said copyright was made by the Register of Copyrights under #68683, and that the said dramatic composition was never reproduced in copies for sale and the complainants have not at any time granted the defendants or any of them, or any other person or persons, any license or privilege to produce the said play or to make a dramatization of the same. That the said play was duly copyrighted under the title "The Evil Hour" and was described as a "Mystery Melodrama." That the [fol. 6] said copyright of said play was secured under the names of the complainants herein, and the fee for registration of said play was duly paid to the Register of Copyrights, and that said complainants duly complied with all requirements of law for the copyrighting of the said dramatic work and thereby obtained a good and valid copyright upon the same.

Fifth. That complainants have at all times been and now are the sole and exclusive authors and proprietors of the said original dramatic composition entitled "The Evil Hour," and the whole thereof, and the copyright therein, together with all the rights to publish, copy, vend, produce, perform, stage and exhibit the said work, and that all said rights are still vested in the complainants.

Sixth. That on or about the 18th day of July, 1924, a synopsis of the said play known as "The Evil Hour" was registered with the Authors League of America under No. 1541, and from and after the said date complainants' play was submitted by the complainants to many theatrical producers including the defendants Lewis and Harris and on information and belief that said play "The Evil Hour" was well known to the defendants Oursler, Brentano, Lewis and Harris, prior to the production and prior to the writing of the play known as "The Spider" as produced in the City of New York, as hereinafter stated.

Seventh. That thereafter and since on or about February 1st, 1927, at Chanin's 46th Street Theatre, located in [fol. 7] the City, County and State of New York, the defendants, and each of them, have been publicly performing and producing and causing to be performed and produced for profit in the State of New York and elsewhere, and are now publicly performing and producing and causing to be performed and produced for profit in the said State, City and County of New York, and in the Southern District of New York, first at a theatre known as Chanin's 46th Street Theatre, New York City, and thereafter and now at a theatre known as "The Music Box Theatre," a certain dramatic composition entitled "The Spider" in which they have copied and are appropriating, using and reproducing as an integral part thereof complainants' original and unique underlying idea, and dramaturgical conception and expression of the same, by the use of spiritualistic medium, and a fear inducing and thrilling seance, with the audience taking part in said seance, as a means of detecting the murderer supposed to be in the audience and using the incidental business and effects, and basic emotion originally conceived by the complainants, and various other pieces of business and portions of complainants' play "The Evil Hour."

Eighth. That the said defendants, Oursler and Brentano, have represented themselves to be, and have continuously and falsely represented themselves to be the authors and originators of the said play entitled "The Spider" as now produced and exhibited by them with full knowledge of the fact that they had appropriated, pirated and plagiarized

the same from the aforesaid play of complainants entitled "The Evil Hour."

[fol. 8] Ninth. That the defendants and each of them have aided and assisted in the production for profit of the said play entitled "The Spider" since on or about February 1st, 1927, and are continuing to produce and exhibit or assist in the production or exhibition of the said play for profit; and have received and are receiving large sums of money through the use and exhibition of the said play entitled "The Spider".

Tenth. Upon information and belief that the matters heretofore referred to as being originally and uniquely conceived by the complainants were not contained in the original version of "The Spider" as originally copyrighted, and for the most part were not contained in "The Spider," as originally publicly produced by defendants, but that the use of the conception above referred to, including the participation of the audience in the seance, was added to said play after it was originally produced and shortly before its said New York production, which additions so made provided a new and different means of detecting the murderer than was originally intended and which addition immediately became not only an integral part of said production, but the outstanding feature thereof; that the spirit seance with the audience participating, and the spiritualistic incidents in the play, have been featured in the public advertisements and are and have been largely responsible for the widespread interest created and large attendance at the various performances. Further, as complainants are informed and believe, the use of said conception was added to said play after the defendant Lewis had considered and discussed the production of complainants' play "The Evil [fol. 9] Hour," and since that time, the matters hereinbefore referred to have been and are being publicly produced for profit by said defendants and each of them as aforesaid.

Eleventh. That notice has been given to the said defendants that said production by them is an infringement upon the rights of the complainants and that they have failed, neglected and refused to discontinue the said production.

Twelfth. That the defendants William E. Morris, Donald Mackenzie, Eleanor Griffith, John F. Morrissey, Arthur

Stewart Hull, John Burkell, Anton Ascher, Priscilla Knowles, Edward Mann, Murray Alper, Walter Travers, Thomas Findlay, John Rogers, Henry Phillippi, John Kelly, Alfred Goldie, D. J. Flanagan, Charles Hamlin, Clifford Stone, John O. Hewitt, Roy Hargrave, H. Yano, Germaine Giroux and John Halliday are actors who have been and are engaged in producing the play entitled "The Spider". That the aforesaid dramatic composition, play or theatrical entertainment entitled "The Spider" is a direct infringement upon complainants' copyright and is and has been taken from complainants' play entitled "The Evil Hour," copyrighted as aforesaid, and is and has been based upon complainants' said work.

Thirteenth. That the defendants, and each of them, at all the times herein set forth, with full knowledge of complainants' rights and of the fact that said dramatic composition "The Spider" was an infringement upon complainants' play "The Evil Hour," for profit, aided and assisted, are [fol. 10] aiding and assisting or have aided or assisted in the writing, production and presentation of the aforesaid infringing dramatic composition or play known as "The Spider".

Fourteenth. That the presentation by the defendants of the play known as "The Spider" as aforesaid has irreparably injured complainants' property in said dramatic composition known as "The Evil Hour," and that by reason thereof, said composition has lost its originality as a dramatic version and that the original features thereof are becoming stale and the public demand therefor is being exhausted by the defendants' said actions, and the original and novel basic ideas of "The Evil Hour" have been used to bolster up and form a basic part of the plot and structure of "The Spider" and the development of said conception as well as a substantial number of incidents, scenes and episodes of the play known as "The Evil Hour" not heretofore alleged have been in detail arrangement and combination copied by the defendants in their said play known as "The Spider," written and produced by them as aforesaid from the complainants' play "The Evil Hour," and that the continuance of the acts of the defendants herein complained of will cause to the complainants irreparable damage; that it has prevented the future production of their

play "The Evil Hour"; that it has and will injure them in their profits and will diminish the amount which they might have otherwise received from the presentation and production of their said play "The Evil Hour" in the United States, and that the actual injury and damage to the com- [fol. 11] plainants by reason of the said acts of the defendants cannot be adequately ascertained or computed, nor can the complainants be properly compensated therefor in an action at law for damages.

Fifteenth. That the wrongful acts of the said defendants as hereinabove set forth are wrongful and continuing, and have all taken place in the City of New York and within the jurisdiction of the Southern District of New York and are in violation of the rights of the complainants herein, as well as of the copyright laws of the United States, and that a copy of the text of the play of complainants consists of about 80 pages and by reason thereof it is impractical to annex a copy thereof to the complaint, and the complainants have not a copy of the manuscript of the infringing dramatic production "The Spider" for the reasons alleged in paragraph Tenth herein, and for the reason that same has not been copyrighted by said defendants.

Sixteenth. That filed in court with this complaint and made a part hereof is a certified photographic copy of the play entitled "The Spider," Registration No. D75375, April 22nd, 1926, copyrighted by the defendants Oursler and Brentano on said date.

Seventeenth. That the aforementioned certified photographic copy of "The Spider," referred to and made a part hereof, does not contain the basic emotion or basic theme of the infringing dramatic composition or play entitled "The Spider" heretofore referred to and now being produced and exhibited by the defendants.

[fol. 12] Eighteenth. That the basic emotion or theme of complainants' play "The Evil Hour" is not the same as that contained in the copyright version of "The Spider," registered by the defendants Oursler and Brentano on April 22nd, 1926, under number D75375 in the Library of Congress, Washington, D. C., heretofore referred to and made a part of this complaint.

Nineteenth. That the basic emotion or theme of complainants' play entitled "The Evil Hour" is the same as that contained in the dramatic production of "The Spider" as it is now being produced and exhibited or caused to be produced and exhibited by the defendants.

Twentieth. "The Evil Hour," the copyrighted play of plaintiffs, is a type of dramatic composition known as a mystery melodrama.

There is in the first and second acts of "The Evil Hour" established a definite theme interest in a spiritualistic seance to be held in a New York theatre. Katie King, characterized as a fake trance medium and expert show woman, is the medium through which this interest is established. There is a discussion of Katie King's remarkable performance and her feat of producing ectoplasm in public. The reference to her seance and supernatural powers are sign posts of construction pointing to and building up interest for the third act, a seance held in a New York theatre with the audience part of the show. Yogi Karmus talks glibly about the Evil Hour which he says in western lands is considered to be midnight but in eastern countries, earlier—10:45 P. M. As the Evil Hour arrives a shining object previously referred to in the play and which was [fol. 13] concealed in Anne's dress falls to the floor. As she stoops to pick it up, Osgood sees it. She unintentionally points it at him. He says in terror "Don't let her kill me." The lights suddenly go out, the stage is dark and when the lights go up again Osgood is found dead upon the floor, the circumstances seeming to implicate Anne with his death.

Chase, who is in love with Anne, pleads with her to tell him all she knows so that he will better be able to protect her. Anne finally tells him that her father, who had invented an extraordinarily powerful poison gas, had been murdered and his poison gas secret stolen. She suspected Osgood of being a member of a traitorous ring of business men who had been trying to buy her father's invention in order to sell it to an enemy government. Suspicion is cast upon several persons as possible murderers of Osgood, including Katie King. While Chase is endeavoring to prove Anne innocent, the tiny poison gas container with which Anne is supposed to have murdered Osgood, is discovered to be a duplicate. Though there is no way of proving this,

Chase is convinced that the guilty person now has the original metal gas container which can be shot like a gun. Then he receives a death warning himself. He is desperate. At this point, Katie King begs Chase to allow her to hold her seance which is scheduled the next night at a New York theatre, telling him she can help him—begs him to let her ask the spirits to help. Chase is skeptical and suspicious of Mrs. King but sees a certain amount of logic in what she says. Mrs. King tells Chase she is not asking him to believe in spirits, though she says that things sometimes happen that are not just make-believe. She points out that [fol. 14] Chase's chief interest is in proving Anne innocent, explaining that he can do that by having all the suspects on the platform of her theatre where the audience can see them at the psychological moment. She further points out that if there is an attempt to murder him at "the evil hour" there will be "a whole theatre full of people all playing detectives themselves—looking for the murderer." In other words, Katie King promises to help Chase prove Anne innocent and with the help of the spirit-seance and the audience, perhaps catch the murderer. Anne tells Chase that if he permits Katie King to hold her seance as planned, he will be the laughing stock of the town. Already the newspapers are attacking him. But Chase is so baffled and pressed for time, he finally agrees to let Mrs. King hold her seance with the audience part of the show. Mrs. King has been handcuffed but says she can't hold her seance with them on, but she is not unhandcuffed.

The action of the entire third act of "The Evil Hour" takes place in a New York theatre with Katie King supposedly in the midst of the second half of her spirit seance, with the audience now part of the show. The theatre is entirely dark at first with Mrs. King's voice announcing from stage that the spirits are all about. A swishing sound is heard over the heads of the audience. Mrs. King tells audience not to be alarmed if they feel a cool breeze blowing over their shoulders, explaining that it is only the spirit of a loved one hovering near. Air hoses send breezes in different directions. Things swish overhead. Luminous hands appear. Strange things *first* overhead. Sparks fly here and there. Actors are planted in the audience to assist [fol. 15] in individual thrills. Mrs. King keeps up a steady stream of dialogue during the seance. There is a weird

tinkling of bells over audience. Mrs. King then announces that she is going to produce ectoplasm which will float out over audience. She warns audience not to touch ectoplasm as it is dangerous for her as well as audience. Mrs. King now announces that she will spell two most important words in letters of ectoplasm. Suddenly all the lights in theatre are turned up and on the stage are seen seated Mrs. King, Anne and other suspects, all handcuffed but Mrs. King. It is not explained how Mrs. King got out of her handcuffs. A comedy officer named O'Flarity and detectives stand on either side of stage with drawn guns. A uniformed policeman stands at each exit with drawn gun. Chase now enters from the wings and immediately begins to address audience down stage. Chase tells audience that they have come there in the interest of spirit communication but asks them to remain in the interest of the community. He assumes that all of the audience is aware of the fact that a dangerous killer is at large in the city and tells them he has every reason to believe that the murderer is in the theatre—on the stage or seated in the audience—perhaps next to any one. He tells them that they already know that he has been accused of shielding Anne by the papers. He has taken out his watch and tells audience that at any moment an attempt upon his life will probably be made. He says that he stands before the audience ready to give his life if necessary to prove Anne innocent. He asks each and every one of the audience to help catch the murderer. Voices in the audience shout that they will help. At exactly 10:45, "the evil hour," a woman in the front row of the audience rises [fol. 16] and shrieks, pointing toward the guilty man, who is now seen with a gleaming bit of metal between his teeth, the gas container aimed at Chase. The guilty man shrieks out a confession of guilt. The mysterious murders are briefly explained by Chase after officer with gun commands audience to stay where they are—not to move. Chase tells audience they may now go home, after thanking them for their help in proving Anne innocent and catching the real murderer. The audience gets a last glimpse of Chase and Anne in each other's arms.

Twenty-first. Complainants further allege that the play as above described has a peculiar originality and excellence and that the combination of scenes incident thereto are en-

tirely novel and are unlike any other incidents or combination of scenes known to be produced prior to said play and particularly that the holding of a spirit seance with the audience taking part therein for the purpose of detecting a murderer and the lines and business incidental thereto constitute one of the principal parts of said play and that it was also original and unique in respect to the conception of having a crime committed in the presence of a spirit medium and in the detection of the murderer supposed possibly to be in the audience, during the fear-inducing business of a spirit seance with the incidental features of such seance mentioned above and with the audience, as stated, aiding in the detection of the murderer.

The basic emotion of the complainants' play is fear, fear produced by mystery in an atmosphere surcharged with murder. The play is a murder-mystery, in short, and with [fol. 17] its atmosphere heightened and brought to a climax in the third act by the use of all the devices of spiritualistic trickery and the use of spiritualism and spiritualistic trickery as a means of detecting and capturing a murderer, as stated above.

The success of the play is made to depend for its effect upon the successful creation of novel and sensational thrills in the audience by the means stated above and the play is novel and original in the unique and original means devised by plaintiffs and used for producing the same, as indicated in the preceding paragraph of this complaint. The play is further unique and original in providing the incidental working out of a solution of a murder mystery by the means indicated above and which relieve innocent persons, and more especially the heroine, from unjust suspicion.

Twenty-second. Upon information and belief that "The Spider," as it is now being produced by the defendants, has the same basic emotion of fear as "The Evil Hour," with essentially the same series of events used to excite the same emotions in the same sequences, peculiar, novel and unique in complainants' play "The Evil Hour," in that Chatrand begs the Inspector to allow him to hold a spirit seance in order to catch the murderer in the theatre, the same as Katie King in "The Evil Hour" begs Commissioner Chase to allow her to hold a spiritual seance in order to allow her to catch the murderer in the theatre; the In-

spector in "The Spider" as now produced says that he will be the laughing stock of the newspapers if he permits Chatrand to hold the seance.

In "The Evil Hour" Commissioner Chase says that he will be the "laughing stock of the town if he permits Katie [fol. 18] King to hold the seance." In "The Spider," as now produced, the Inspector permits Chatrand to hold the seance and handcuffs him before the seance commences—during the seance itself Chatrand is not handcuffed—the Inspector asks for cooperation of the audience and tells the audience "There is a dangerous criminal in this audience"; in "The Evil Hour" Katie King is permitted to hold the seance and she is handcuffed before the seance—during the seance she is not handcuffed. Commissioner Chase asked for cooperation of the audience, saying: "I must ask you to remain in the interest of the community, and I have every reason to believe that the murderer is in this theatre, on the stage or seated in the audience—perhaps next to any one of you." In "The Spider," as now produced, Chatrand is trying to prove that the heroine's brother is innocent and in "The Evil Hour" Commissioner Chase says "I am here tonight to prove Miss Marlow innocent of these hideous crimes."

In "The Spider," as now produced, both the inspector and Chatrand ask the audience to help capture the murderer. In "The Evil Hour," Commissioner Chase says "I ask each and every one of you to help capture the murderer."

In "The Spider," when Chatrand is pleading with the inspector for a chance to hold the seance, the inspector expresses doubt of the success of the seance in capturing the murderer, and in using the audience as a part of the seance, but Chatrand admitting he is a pure fake, says that strange things sometimes happen. The theatre manager tells the inspector that the audience is impatient and wants to put on the show. In "The Evil Hour," Commissioner Chase says to Mrs. King, "Do you really expect me to take you [fol. 19] seriously, Mrs. King? You who have already admitted that you are a fake from start to finish, etc." Mrs. King then says "I ain't asking you to believe the spirits, though there is things that sometimes happens that ain't just make believe." She then says "The spirits is getting anxious, Capt. Chase, and so is my audience."

Estelle, Chatrand's assistant in "The Spider," turns out the house lights, and lights in the audience, making the entire theatre dark. The audience is told it cannot leave the theatre and Chatrand asks the audience to give him their undivided attention and cooperation during the seance, and asks the audience to concentrate, assuming that there are many spiritualists in the audience. Then Chatrand talks about and does produce ectoplasm which floats out over the audience and scares them to death. In "The Evil Hour," Mrs. King turns out all the lights in the theatre, and later confesses that she did it (p. 3, Act 3, Scene 1). Officer O'Flarity tells the audience "The ushers will please close and lock all the doors so that no one can get in or get out." Mrs. King then says "I must ask you all to be special quiet as I go into me trance." Then she says (Act 3) "If you will all help me—concentrate, etc." The audience is now a part of the play. Mrs. King then says, "Now, ladies and gentlemen, I will produce a yard and six inches of ectoplasm"; whereupon ectoplasm begins emanating from the centre of the stage and floats out over the heads of the audience (being phosphorous on cotton batten manipulated by wires). Then Mrs. King (Act 3, p. 1) says "Don't be alarmed, folks, if you hear and feel strange things tonight, [fol. 20] and a cool breeze blowing over your shoulders" (air hoses send breezes in different directions and sparks flash here and there and things swish over the heads of the audience, the same as in "The Spider."

In "The Spider," during this seance, people are planted in the audience to shriek and in "The Evil Hour" (Act 3, p. 1) people are also planted in the audience for the same purpose, and there is a weird tinkling of bells over the audience, and luminous hands appear, etc.

In "The Spider," after the seance and during the action of this high point of the play, policemen stand with drawn guns on each side of the stage and several are posted in the aisles throughout the theatre. The Inspector tells an officer to keep his eye on Chatrand. Then Chatrand, the assistant, goes into a trance and when the guilty man is found in the audience as a result of this spiritualistic seance, the Inspector says to the audience "You may now all go home." In "The Evil Hour," Mrs. King goes into a trance and her eyes are shut and her face is dead white and after the guilty murderer has been found in the au-

dience, Commissioner Chase says to the audience, "I thank you all, you may now go home, etc."

In both plays, after the crime has been committed, the police, in an effort to detect the criminal, who they have every reason to believe is still within the theatre, proceed on the theory that the cumulative impact of each succeeding phase of action or dialogue during the seance would be too great for the criminal to endure with a degree of [fol. 21] equanimity capable of escaping the careful scrutiny of the assembled "audience police."

Twenty-third. That the defendants persist in the said wrongful acts, and, unless they are enjoined and restrained by injunction pendente lite, the value of the complainants' rights will be destroyed and the complainants' damages will not be less than $250,000.

Wherefore complainants pray:

1. That a writ of subpœna issue out of this Court, directed to the defendants and each of them, commanding them to appear and answer this Bill of Complaint within twenty (20) days after the service of the said writ.

2. That the defendants and each of them, and all persons acting under the defendants' direction, control, permission and license, be restrained and enjoined, during the pendency of this action and perpetually thereafter, from publicly producing, presenting, performing, publishing or advertising their said infringing play at present entitled "The Spider" or permitting to be done any of the aforesaid acts.

3. That the defendants and each of them be required to account for, and pay over to the complainant, any and all profits derived from any and all productions and presentations of the said dramatic composition, play or theatrical entertainment now known as "The Spider," at any and all places, whether public or private; and that for that purpose the defendants and each of them be required to exhibit their books and discover all papers and accounts in their [fol. 22] possession with relation to all funds derived from the presentation of the said play "The Spider," and the method of their application.

4. That defendants and each of them be required to pay to the complainants any and all damages sustained by the complainants in the premises, and any and all penalties imposed by the Copyright Laws.

5. That the defendants and each of them pay the costs of this suit, and that a reasonable attorneys' fee be allowed to the complainants.

6. That the defendants and each of them, and all persons acting under their direction, control, and license, be enjoined and restrained during the pendency of this action from using or dissipating any of the profits or income from any and all productions of the aforesaid play "The Spider" and that all such monies be impounded under the direction of this Court until a final determination of this action.

7. That the complainants have such other and further relief as may be just and proper.

Lorenz & Lorenz, Solicitors for Complainants. Office & Post Office address: 36 West 44th Street, Borough of Manhattan, City of New York. Du Bois J. Gillette, Solicitor of Counsel.

[fol. 23] IN UNITED STATES DISTRICT COURT

[Title omitted]

AMENDMENTS ALLOWED TO COMPLAINT

The complainants above named, by Lorenz & Lorenz, their solicitors, move to amend the complaint as follows:

1. To add a paragraph entitled Fourth (a) to read:

"That thereafter various changes were made in said dramatic composition by complainants, and that said dramatic composition as so revised has never been published."

2. To amend paragraph Sixth so as to insert the portion italicized below, so that said paragraph shall read as follows:

"Sixth. That on or about the 18th day of July, 1924, a synopsis of the said play known as 'The Evil Hour' was registered with the Authors' League of America under No.

[fol. 24] 1541, and from and after said date complainants' play *or dramatic composition, both in its copyright form and as so revised*, was submitted by the complainants to many theatrical producers including the defendants Lewis and Harris and on information and belief that said play 'The Evil Hour' was well known to the defendants Oursler, Brentano, Lewis and Harris, prior to the production and prior to the writing of the play known as 'The Spider' as produced in the City of New York as hereinafter stated."

3. To amend paragraph Fifteenth so as to insert the portion italicized below, so that said paragraph will read as follows:

"Fifteenth. That the wrongful acts of the said defendants as hereinabove set forth are wrongful and continuing, and have all taken place in the City of New York and within the jurisdiction of the Southern District of New York and are in violation of the rights of the complainants herein *at common law and in equity, and constitute unfair business practices and unfair competition against the complainants herein*, as well as of the copyright laws of the United States, * * *."

4. To make the insertion italicized below in paragraph Twentieth so that the first sentence thereof shall read as follows:

"Twentieth. 'The Evil Hour,' the copyrighted play of [fol. 25] plaintiffs and said play *as revised as aforesaid*, is a type of dramatic composition known as a mystery melodrama."

Lorenz & Lorenz, Solicitors for Complainants. Office & Post Office address: 165 Broadway, Borough of Manhattan, City of New York.

IN UNITED STATES DISTRICT COURT

[Title omitted]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This action having been reached for trial on the 5th day of November, 1931, and having been tried on the 5th, 6th,

9th, 10th and 28th days of November, 1931, and the complainants having appeared at such trial by Messrs. Lorenz & Lorenz (Keith Lorenz, Esq., of counsel) and the defendant Fulton Oursler, by Messrs. Hays, St. John, Abramson & Schulman (Arthur Garfield Hays and Alan S. Hays, [fol. 26] Esqs., of counsel) the defendant Lowell Brentano by Paul N. Turner, Esq., and defendants Sam H. Harris and Albert Lewis, by Messrs. O'Brien, Malevinsky & Driscoll (Arthur Driscoll, Esq., of counsel) having appeared at such trial, and the allegations and proof of the respective parties having been heard and given, and the Court having excluded from evidence, any proof in support of the allegations of Paragraph "Fifteenth" of the Complaint as Amended, in so far as said allegations are based upon claims other than a claim of violation of the Copyright Law of the United States, and this Court having considered the argument of counsel and the allegations and proof, and after due deliberation had, I do find and decide as follows:

Findings of Fact

1. Complainants are citizens of the United States, residing in the City, County and State of New York, and in the Southern District of New York, and that the defendants are residents of such State and District.

2. Prior to the 25th day of August, 1924, the complainants composed and were the authors and proprietors of an unpublished dramatic composition entitled "The Evil Hour".

3. That on or about the 26th day of August, 1924, the complainants deposited one complete copy of said dramatic composition, with claim of copyright thereof, in the Copyright Office of the United States of America, situate in the Library of Congress, Washington, D. C., in accordance with the statute of the United States in such case made and pro- [fol. 27] vided and did secure copyright upon the aforesaid dramatic composition in conformity with Sec. 55 of the Act to Amend and Consolidate the Acts respective Copyright, approved March 4, 1909, as amended by the Act approved March 2nd, 1913; that entry of said copyright was made by the Register of Copyrights under #68683, and that the said dramatic composition was never reproduced in copies for

sale and the complainants have not at any time granted the defendants, or any of them, or any other person or persons, any license or privilege to produce the said play or to make a dramatization of the same. That the said play was duly copyrighted under the title "The Evil Hour" and was described as a "Mystery Melodrama". That the said copyright of said play was secured under the names of the complainants herein, and the fee for registration of said play was duly paid to the Register of Copyrights, and that said complainants duly complied with all requirements of law for the copyrighting of the said dramatic work.

4. That complainants have at all times been and now are the sole and exclusive authors and proprietors of the said dramatic composition entitled "The Evil Hour," and the whole thereof, and the copyright therein, together with all rights to publish, copy, vend, produce, perform, stage and exhibit the said work, and that all said rights are still vested in the complainants.

5. That following the copyrighting of said dramatic composition "The Evil Hour," the same was submitted in said copyrighted form to the defendant Lewis for examina-[fol. 28] tion for the purpose of production, and that said play "The Evil Hour" as copyrighted was known to the defendant Lewis, prior to the production and prior to the writing of the play known as "The Spider" hereinafter mentioned, as produced in the City of New York.

6. That prior to the summer of 1926 complainants herein composed a revised version of the play "The Evil Hour" and in or about the early summer of 1926 submitted the same to the defendant Lewis for examination, and that said revised version of "The Evil Hour" marked in evidence herein as Exhibit "7" was known to the defendant Lewis prior to the production and prior to the writing of the play known as "The Spider" in its form as produced in the City of New York as hereinafter stated; that said revised version of "The Evil Hour" was never copyrighted in the Copyright Office of the United States and the same has never been published.

7. That the answering defendants, Fulton Oursler and Lowell Brentano are the authors and proprietors of the dramatic work "The Spider," and that the same was duly

copyrighted in the Copyright Office of the United States of America, on or about the 29th day of April, 1926. That a revised version of "The Spider" was thereafter composed, but not copyrighted in the Copyright Office of the United States, and said revised version has never been published.

8. That from on or about February 1, 1927, and for some time thereafter, the defendants and each of them publicly performed and produced and caused to be performed and produced for profit in the State of New York and elsewhere, and in the Southern District of New York, first at a theatre [fol. 29] known as Chanin's 46th Street Theatre, and thereafter at a theatre known as The Music Box Theatre, the said dramatic composition entitled "The Spider" in its revised form as aforesaid.

9. That no version of the defendants' play "The Spider" infringed in any way, either with respect to plot, material, arrangement or sequence of events, or incidents, or otherwise, the plaintiffs' copyrighted play, "The Evil Hour," in contravention of the Copyright Law of the United States.

10. That the reasonable value of the services of counsel for the defendant Fulton Oursler rendered in this action is the sum of $1,000.00; that the reasonable value of the services of counsel for the defendant Lowell Brentano rendered in this action is the sum of $1,000.00.

11. That the action brought by the complainants herein was brought in good faith, and not in a fraudulent attempt to give jurisdiction to the District Court of the United States, in said Southern District of New York, upon any cause or causes of action at common law or in equity, arising by virtue of any law or laws other than that of the Copyright Law of the United States, and not with any intent to have said Court decide this suit on local or state questions only.

Conclusions of Law

1. That in view of the conclusion reached by the Court of lack of copyright infringement, this Court is without juris- [fol. 30] diction to entertain the allegations in paragraph Fifteenth of the Complaint as amended, and to admit in evidence any proof thereof, in so far as they are based upon claims other than a claim of violation of the Copyright Law of the United States.

2. That the answering defendants, Fulton Oursler and Lowell Brentano, Albert Lewis and Sam H. Harris, are entitled to judgment dismissing the complaint of the complainants on the merits, with costs to be taxed by the Clerk, said costs to be paid by the complainants and by their surety, and in which costs shall be included a counsel fee of $1,000 to be paid by complainants and their surety to the defendant Fulton Oursler and a further counsel fee in the sum of $1,000 to be paid by complainants and their surety to the defendant Lowell Brentano.

Julian W. Mack, Judge of the United States District Court in and for the Southern District of New York.

[fol. 31] In United States District Court, Southern District of New York

Philip Hurn and Percy Morgan, Jr., Plaintiffs,

against

Fulton Oursler, Lowell Brentano, Sam H. Harris, Albert Lewis et al., Defendants

Decree Dismissing Complaint

This cause having come on to be heard at the November Term of this Court and having been tried on the 5th, 6th, 9th, 10th and 28th days of November, 1931, upon the pleadings and proofs; and Messrs. Lorenz & Lorenz (Keith Lorenz, Esq., of counsel) having been heard on the part of the complainants, and Messrs. Hays, St. John, Abramson & Schulman (Arthur Garfield Hays and Alan S. Hays, Esqs., of counsel) for the defendant Fulton Oursler, and Paul N. Turner, Esq., for the defendant Lowell Brentano, and Messrs. O'Brien, Malevinsky & Driscoll (Arthur Driscoll, Esq., of counsel) for the defendants Sam H. Harris and Albert Lewis, having been heard on the part of said defendants, and due deliberation having been had, and the findings of fact and conclusions of law required under Equity Rule 70½ having been filed by the Court herein, and the Court having made its decision, as appears more particularly from the said findings of fact and conclusions of law, it is

[fol. 32] Ordered, adjudged and decreed that the bill of complaint herein be and the same hereby is dismissed upon the merits as to all of the defendants; and it is further

Ordered, adjudged and decreed that the defendants severally recover from the complainants their costs as taxed and that the defendants severally have execution therefor; and it is further

Ordered, adjudged and decreed that the costs so taxed shall include the following allowances, hereby awarded as counsel fees: To the defendant Fulton Oursler, the sum of $1,000; to the defendant Lowell Brentano, the sum of $1,000; and it is further

Ordered, adjudged and decreed that the several allowances of counsel fees hereinabove referred to are granted without prejudice to the rights of the respective defendants or any of them to apply for further allowance of counsel fee in the event of an appeal herein.

Julian W. Mack, United States Circuit Judge.

[fol. 33] In United States District Court

[Title omitted]

Petition of Appeal

To the Honorable Judges of the United States District Court for the Southern District of New York:

And now come Philip Hurn and Percy Morgan, Jr., who respectfully represent that on the 22nd day of December, 1931, a decree was entered by this Court dismissing the complaint herein upon the merits. Your petitioners respectfully show that in and by said decree manifest error was committed and your petitioners do hereby appeal from the said decree to the Circuit Court of Appeals for the Second Circuit, for the reasons set forth in the assignment of errors filed herein, and they pray that this appeal be allowed, and that a citation be issued as provided by law, and that a transcript of the record and proceedings in the case be sent to the Circuit Court of Appeals for the Second Circuit, under

[fol. 34] the rules of such Court for such cases made and provided.

Dated New York, January 19, 1932.

Lorenz & Lorenz, Attorneys for Complainants and Appellants. Office & Post Office address: 165 Broadway, Borough of Manhattan, City of New York.

IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS

Now come the plaintiffs and appellants, Philip Hurn and Percy Morgan, Jr., in the above entitled cause and file the following assignment of errors upon which they will rely upon their prosecution of the appeal in the above entitled cause from the decree made and entered by this Court on the 22nd day of December, 1931.

[fol. 35] The Court erred in dismissing the bill of complaint upon the merits for the following reasons:

1st. The Court erred in holding that, in view of the conclusion reached by it of lack of copyright infringement, it was without jurisdiction to entertain the allegations in paragraph Fifteenth of the complaint as amended, and to admit in evidence any proof thereof, in so far as they were based upon claims other than a claim of violation of the Copyright Law of the United States.

2nd. The Court erred in holding that, in view of the conclusion reached by it of lack of copyright infringement, it was without jurisdiction to entertain the allegations of the complaint as amended, and to admit in evidence any proof thereof, in so far as the acts of the defendants complained of were in violation of the rights of the complainants at common law and in equity, and constituted unfair business practices and unfair competition as against the complainants herein.

Wherefore the appellants pray that the said decree be reversed and the said District Court for the Southern District of New York be ordered to enter a decree reversing

the decision of said Court in such cause, and that such other or further disposition may be made as in accordance [fol. 36] with the law and statutes of the United States in such matter made and provided.

All of which is respectfully submitted.

Dated New York, January 19, 1932.

Lorenz & Lorenz, Attorneys for Complainants and Appellants. Office & Post Office address: 165 Broadway, Borough of Manhattan, City of New York.

In United States District Court

[Title omitted]

Allowance of Appeal

On reading the petition of Philip Hurn and Percy Morgan, Jr., for appeal and consideration of the assignment of errors submitted herewith in the above entitled cause, it is [fols. 37 & 38] Ordered that the appeal as prayed for be and it is hereby allowed, and that a certified transcript of the record and the proceedings be forthwith transmitted to the Circuit Court of Appeals for the Second Circuit, and it is further

Ordered that an undertaking for costs and which shall also act as a supersedeas, in the sum of $2,504.32, be filed on the appeal, providing that the appellants shall prosecute their appeal to effect, or if they fail to make their appeal good, that they shall answer all damages and costs.

Dated New York, February 2, 1932.

Julian W. Mack, U. S. C. J.

Citation on Appeal omitted in printing.

[fol. 39] In United States District Court

[Title omitted]

Præcipe on Appeal

Sirs: Please take notice that the following is a Præcipe which indicates the portions of the record to be incorporated into the transcript on the appeal herein:

1. Statement prefixed to record, in form appended hereto;
2. Bill of Complaint (except certified photographic copy of "The Spider," as copyrighted, made a part thereof by paragraph Sixteenth;
3. Amendments to Complaint;
4. Findings of Fact and Conclusions of Law;
5. Decree dismissing Complaint on the Merits;
[fol. 40] 6. Petition for Appeal;
7. Assignment of Errors;
8. Allowance of Appeal;
9. Citation on Appeal;
10. This Præcipe and Order of Court thereon; and
11. Clerk's Certificate.

Dated February 15, 1932.

Yours, etc., Lorenz & Lorenz, Attorneys for Complainants-Appellants. Office and Post Office address: 165 Broadway, Borough of Manhattan, City of New York.

(Addressed to all attorneys of record.)

[fol. 41] In United States District Court

[Title omitted]

Order Granting Præcipe—March 26, 1932

The above complainants having filed a præcipe and the above defendants a counter-præcipe on the appeal herein, and the complainants, by notice dated March 7, 1932, having notified the defendants that they would submit to Judge Julian W. Mack, at his Chambers in the Woolworth Building, Borough of Manhattan, City of New York, the difference arising between the parties as to the general contents of the record to be prepared on the appeal, for directions from the Court on the subject, and the same having been duly submitted to the said Court on the 16th day of March, 1932, and after hearing Messrs. Lorenz & Lorenz, Keith Lorenz, Esq., of counsel, attorneys for the complainants [fol. 42] in support of the præcipe filed by the complainants, and Messrs. Hays, St. John, Abramson & Schulman,

Alan S. Hays, Esq., of counsel, attorneys for the defendant Fulton Oursler, Paul N. Turner, Esq., attorney for the defendant Lowell Brentano, and Messrs. O'Brien, Malevinsky & Driscoll, attorneys for the defendants Sam H. Harris and Albert Lewis, in support of the counter-præcipe filed by the defendants, and the Court having filed a memorandum on March 17, 1932, granting the præcipe proposed by the complainants;

Now, on motion of Messrs. Lorenz & Lorenz, attorneys for the complainants, it is

Ordered that the præcipe proposed by the complainants, indicating the portions of the record to be incorporated into the transcript on the appeal herein, be and the same hereby is granted.

J. W. Mack, U. S. C. J.

[fol. 43] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AS TO TRANSCRIPT OF RECORD

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court in the above entitled matter as ordered by the said Court on March 26th, 1932. This stipulation is made, however, without prejudice to the rights of the defendants to renew, at any time and in any Court, any and all their objections to the said order of the said Court denying the defendants' request for the inclusion of additional matters in this record as indicated in defendants' counter-præcipe, and defendants reserve any and all exceptions taken to the foregoing form and substance of this record.

Dated N. Y., April 18, 1932.

Lorenz & Lorenz, Attorneys for Complainants. Hays, St. John, Abramson & Schulman, Attorneys for Defendant Fulton Oursler. Paul N. Turner, Attorney for Defendant Lowell Brentano. O'Brien, Malevinsky & Driscoll Attorneys for Defendants Albert Lewis and Sam H. Harris.

[fol. 44] Clerk's certificate to foregoing transcript omitted in printing.

[fols. 45 & 45½] In United States Circuit Court of Appeals for the Second Circuit

Philip Hurn and Percy Morgan, Jr., Complainant-Appellants,

against

Fulton Oursler, Lowell Brentano, Albert Lewis, and Sam H. Harris, Defendants-Appellees

Appeal from the District Court for the Southern District of New York

Before Manton, Augustus N. Hand, and Chase, Circuit Judges

Lorenz & Lorenz, Esqs., Attorneys for Plaintiff. Joseph Lorenz, Esq., of Counsel.

Hays, St. John, Abramson & Schulman, Esqs., Solicitors for Oursler. Arthur Garfield Hays, Esq., Alan S. Hays, Esq., of Counsel.

O'Brien, Malevinsky & Driscoll, Esqs., Attorneys for Albert Lewis and Sam H. Harris. Arthur F. Driscoll, Esq., Benjamin Pepper, Esq., George D. Bradford, Esq., of Counsel.

Paul N. Turner, Esq., Attorney for Lowell Brentano.

Opinion

Per Curiam:

Decree affirmed on the authority of Standard Paint Co. v. Trinidad Asphalt Co., 220 U. S. 446; Ingrassia v. A. C. W. Mfg. Corp., 24 Fed. (2) 703 (C. C. A. 2); U. S. Bolt Co. v. Kroncke Hardware Co., 234 Fed. 868 (C. C. A. 7).

[fol. 46] In United States Circuit Court of Appeals, Second Circuit

Philip Hurn and Percy Morgan, Jr., Plaintiffs-Appellants,

vs.

Fulton Oursler et al., Defendants-Appellees

Appeal from the District Court of the United States for the Southern District of New York

Decree—Filed Nov. 14, 1932

This cause came on to be heard on the transcript of record from the District Court of the United States for the

Southern District of New York and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be, and it hereby is, affirmed, with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 47] [File endorsement omitted.]

[fol. 48] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 49] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed January 23, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted, and the case is assigned for argument immediately following No. 423, Levering & Garrigues Company et al. vs. Paul J. Morrin, Individually and as President of International Association of Bridge, Structural and Ornamental Iron Workers, et al.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 37,262. U. S. Circuit Court of Appeals, Second Circuit. Term No. 565. Philip Hurn and Percy Morgan, Jr., petitioners, vs. Fulton Oursler, Lowell Brentano, Albert Lewis, and Sam H. Harris. Petition for a writ of certiorari and exhibit thereto. Filed December 23, 1932. File No. 37,262.